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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 631.

BERTHA MERRICK,
Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

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Of Respondent in Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

I.

In an action on a contract of insurance providing for periodic income payments in the event of total disability, under Missouri law, is the insured entitled to recover commuted benefits based upon life expectancy on the theory the insurer has been guilty of an anticipatory breach of the contract?

II.

In such an action, where the holder has been denied recovery in the District Court and the Court of Appeals below, should this court exercise its discretionary power to review the judgment?

STATEMENT SUPPLEMENTING PETITIONER'S STATEMENT.

At the time the District Court ruled, respondent was not in default to petitioner for any disability income payments and there was nothing then due petitioner (R. 9-10). Respondent has continued to pay and petitioner has continued to accept, up to the present time, the weekly benefits provided by the disability income policy in question (Affidavit of Petitioner [R. 6]).

SUMMARY OF ARGUMENT.

(1) The decisions of the District Court and the Court of Appeals are correct and in accord with this court's decisions.

(2) Under Missouri decisions involving disability income policies, recovery can be had only for payments in default and an action for anticipatory breach does not lie.

(3) The District Court's action in sustaining respondent's motion for summary judgment and the subsequent action of the Court of Appeals in affirming that judgment were correct, since respondent was entitled to judgment as a matter of law. Furthermore, petitioner's contention was not properly preserved for this court's consideration, since the point raised here was not raised by petitioner in the Court of Appeals.

ARGUMENT.

(1-2) Under the Missouri decisions, the holder of a contract of insurance providing for periodic income payments in the event of disability is not entitled to recover for commuted benefits based upon life expectancy on the theory the insurer has been guilty of an anticipatory breach of the contract. **Allen v. National Life & Accident Ins. Co.**, 228 Mo. App. 450, 67 S. W. 2d 534; **Buis v. Prudential Ins. Co. of America**, 229 Mo. App. 190, 77 S. W. 2d 127.

The reason for the rule, as explained by the court in the **Allen** case, supra, involves an application of the rule laid down in the leading case of **Roehm v. Horst**, 20 S. Ct. 876, 178 U. S. 1, 44 L. Ed. 953, which has been followed in Missouri. The **Roehm** case, supra, held that anticipatory breach lies only in situations where the contract is mutually executory, at least in part, and there is a repudiation of the contract on the part of one covering the entire performance before the time for performance. In such situations, the breach gives an immediate right of action for the entire damage.

However, ordinarily no action lies for anticipatory breach of a contract providing for the payment of stipulated sums of money at definite periods. Where one party has completed his part of the contract and the contract is executory on the part of the other party only, such as when money is to be paid to the other contracting party at specified times, under the Missouri decisions, in the event of breach, suit may be brought only to collect the amount due at the time the suit is commenced. **Bonslett v. New York Life Ins. Co.**, Mo., 190 S. W. 870; **Chipley v. National Life and Accident Company**, Mo. App., 67 S. W. 2d 992.

Specifically, disability contracts have been held in Missouri to be contracts to pay money at specified times

and, thus, only unilaterally executory and not subject to the doctrine of anticipatory breach. **Allen v. National Life & Accident Ins. Co.**, supra; **Buis v. Prudential Ins. Co. of America**, supra. In any event, before the principle of anticipatory breach is applicable at all, there must have been an absolute and unambiguous repudiation of the entire contract **while executory** on both sides. **Mobley v. New York Life Ins. Co.**, 55 S. Ct. 876, 295 U. S. 632, 79 L. Ed. 1621.

In **New York Life Insurance Company v. Viglas**, 56 S. Ct. 615, 297 U. S. 672, 80 L. Ed. 971, this court, citing **Allen v. National Life & Accident Ins. Co.**, supra, and a number of other cases, stated there is an "impressive concord of opinion that there can be no recovery for commuted benefits based upon life expectancy under a disability income policy."

The law of Missouri is clear and firmly established and in accord with the decisions of this court.

(3) The District Court and the Court of Appeals properly applied the summary judgment rule, Rule 56 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., since respondent was entitled to judgment as a matter of law. **Allen v. National Life & Accident Ins. Co.**, supra; **Buis v. Prudential Ins. Co. of America**, supra, and the multitude of cases cited under points 1 and 2 for argument.

Furthermore, the questions presented in the petition for writ of certiorari were not raised in the Court of Appeals or in the trial court, and, consequently, are not before this court for review. Up until this time, petitioner has urged adoption of an exception to the general rule that there can be no recovery for commuted benefits based upon life expectancy under a disability income policy. Now, for the first time, petitioner urges that summary judgment should not have been granted since she may be able to present fact questions for a jury to

consider. In the trial court, petitioner did not, by affidavit or otherwise, set up the facts which she contends should be passed upon by a jury, as required by Rule 56 (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and no such facts are before the court.

It is clear that points for review not raised below are not open on a petition for writ of certiorari. **Ellis v. Dixon,** 75 S. Ct. 850, 349 U. S. 458, 99 L. Ed. 1231, Rehearing denied 76 S. Ct. 37, 350 U. S. 855, 100 L. Ed. 759; **Blair v. Oesterlein,** 48 S. Ct. 87, 275 U. S. 220, 72 L. Ed. 249.

CONCLUSION.

Petitioner failed to show that the Court of Appeals, in its opinion in this case, decided a question of substance not heretofore determined by this court or in a way probably not in accord with applicable decisions of this court.

Respondent therefore submits that the petition should be denied.

Respectfully submitted,

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